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No. 99-387

Supreme Court, U.S.
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In the

Supreme Court of the United States

THOMAS E. RALEIGH, Chapter 7 Trustee for Estate of William J. Stoecker,

Petitioner,

v.

STATE OF ILLINOIS, DEPARTMENT OF REVENUE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit correctly held—in agreement with the only other court of appeals to have thoroughly analyzed the question—that Congress has not seen fit in the Bankruptcy Code to shift the burden of proof to the government on tax claims, a burden that substantive tax law ordinarily places on taxpayers, when the government brings tax claims in the bankruptcy court.

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STATEMENT OF THE CASE

1. Chandler Enterprises and Stoecker

Chandler Enterprises, Inc., was an Illinois corporation, and William J. Stoecker was its president and one of its directors. Chandler's officers included one Lawrence Pluhar, who also served as an officer of other corporations involving Stoecker. According to Chandler's counsel, Pluhar acted "like his [Stoecker's] chief financial officer." Other than that single comment, though, there is no evidence of the duties Stoecker or Pluhar performed for Chandler. Nor is there any evidence of the nature of Chandler's business. Chandler was involuntarily dissolved in 1990.

In 1989, Stoecker's creditors initiated an involuntary proceeding against him under chapter 11 of the Bankruptcy Code. The proceeding was later converted to a liquidation under chapter 7. In 1990, Stoecker was denied a discharge.

Chandler was just one of many corporations in a corporate empire that revolved around Stoecker. A federal grand jury later indicted Stoecker and Pluhar on numerous counts of mail, wire and bank fraud in connection with these companies. The indictment alleged that many of the Stoecker companies—including Chandler—were shells, having no substantial assets, value, income, or business operations. Stoecker and Pluhar were eventually convicted on a superseding indictment. *See United States v. William Stoecker, et al.*, No. 95 CR 118 (N.D. Ill. March 4, 1997). The case is on appeal, captioned *United States v. William Stoecker, et al.*, No. 97-3870 (7th Cir.).

2. Chandler's Purchase of the Aircraft

In early 1988, Chandler became interested in purchasing a corporate jet. Chandler hired Jack Prewitt & Associates ("JPA"), an aircraft broker, to locate an aircraft for sale, and JPA found a Dassault Falcon 50 in the possession of Bezwada Investments Pty. Ltd., an Australian company. Chandler entered into an "Exclusive Purchase Agreement" with JPA under which JPA would serve as broker for the sale.

Although Chandler intended to purchase the aircraft outright, when the time came Chandler was unable to pay the full purchase price. Prewitt Leasing, Inc., a corporation related to JPA, offered to finance the sale. On June 7, 1988, Chandler accordingly entered into an "Aircraft Lease/Purchase Agreement" with Prewitt Leasing. Stoecker signed the Agreement as Chandler's president. Chandler paid Prewitt Leasing $2,455,016, agreed to pay an additional $10 million plus interest upon "closing," and took delivery of the aircraft. The aircraft entered Illinois on June 7, 1988.[1]

Some months later, Chandler obtained financing from NEMLC Leasing Corporation to pay the balance of the purchase price. On September 30, 1988, Chandler entered into an "Aircraft Purchase Agreement" with Prewitt Leasing that was signed by Pluhar as assistant

[1] The Trustee states that the only evidence the Department had linking Stoecker to the affairs of Chandler was Stoecker's position as one of Chandler's officers and directors. (Pet. at 3-4). In fact, Stoecker was also involved in the purchase of the aircraft, signing the Agreement himself. (Bankruptcy Record ("B.R.") vol. 4, Prewitt Dep. Ex. 3).

secretary of Chandler. Chandler paid Prewitt Leasing the balance of the purchase price, and title to the aircraft was transferred to Chandler.[2]

In connection with the closing, NEMLC sought a legal opinion from Chandler concerning the taxability of the transaction under Illinois law. Chandler's counsel prepared a letter dated September 30, 1988, in which he opined that the sale was an "occasional sale" not subject to Illinois use tax. (B.R. 1992 Tr., Trustee Ex. 3). The opinion letter was sent to NEMLC, a copy was sent to Pluhar, and a copy was included in the closing book sent to Pluhar. (BR. 1992 Tr. at 130-31). There is no evidence that Stoecker ever saw the letter. No opinion letter was issued to Chandler or Stoecker in connection with the transaction. (*Id.* at 136).[3]

Chandler registered the aircraft with the F.A.A. at an address in Oak Forest, Illinois, but never registered the aircraft with the Illinois Department of Transportation, Division of Aeronautics, as Illinois law required. *See* Ill. Rev. Stat. ch. 15½, ¶ 22.42 (1989). No certificate of registration could have been issued without proof either that Illinois use tax had been paid or that no tax was due.

[2] The Trustee asserts that Chandler purchased the aircraft in September 1988. (Pet. at 3). The Department has disputed this assertion, contending that for purposes of Illinois law the sale took place in June 1988 when Chandler put down the initial $2.45 million, signed the Agreement, and took possession of the aircraft. The court of appeals did not address this issue in its opinion, and the issue is not relevant to the question presented here.

[3] The statement in the petition that "Chandler obtained" the opinion letter (Pet. at 3) is incorrect. NEMLC obtained the letter, not Chandler. (B.R. 1992 Tr., Trustee Ex. 3).

3. The Illinois Use Tax

The Illinois "sales tax" scheme consists of two taxes: a retailer's occupation tax, Ill. Rev. Stat. ch. 120, ¶¶ 440-53 (1989), and a use tax, Ill. Rev. Stat. ch. 120, ¶¶ 439.1-.22 (1989). The occupation tax is a tax "upon persons engaged in the business of selling personal property" in Illinois. Ill. Rev. Stat. ch. 120, ¶ 441 (1989). The use tax is a complementary tax "upon the privilege of using in this State tangible personal property," regardless of whether the property is purchased in Illinois. Ill. Rev. Stat. ch. 120, ¶ 439.3 (1989).

Unlike the occupation tax, the use tax is imposed on the purchaser of the property. Retailers in Illinois and foreign retailers with an adequate nexus to Illinois are charged with collecting the tax and remitting it to the Illinois Department of Revenue. Ill. Rev. Stat. ch. 120, ¶ 439.3 (1989). However, any tax "not paid to a retailer . . . shall be paid to the Department directly by any person using such property within this State." *Id.* Purchasers from a retailer who does not pay the tax must file a return with the Department and pay the tax themselves. Ill. Rev. Stat. ch. 120, ¶ 439.10 (1989).

If no return is filed, the Department determines the tax due and issues a Notice of Tax Liability ("NTL") to the taxpayer. Ill. Rev. Stat. ch. 120, ¶ 444 (1989). The taxpayer may then file a protest and request a hearing. *Id.* If no protest is filed, the NTL becomes a final assessment. *Id.* Decisions of the Department, including final assessments, are subject to administrative review in the Illinois courts. Ill. Rev. Stat. ch. 120, ¶¶ 444, 451 (1989).

When a corporation fails to pay either the use or occupation tax it owes, responsible corporate officers and

employees may be held liable for a penalty equal to the unpaid tax:

> Any officer or employee of any corporation subject to the provisions of this Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed . . . and who wilfully fails to file such return or make such payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the corporation, including interest and penalties thereon . . . .

Ill. Rev. Stat. ch. 120, ¶ 452½ (1989). When the Department determines that a penalty should be imposed, the Department issues a notice of penalty liability ("NPL") to the officer or employee. *Id.* As with an NTL, the officer or employee can seek an administrative hearing and administrative review in the Illinois courts. *Id.*

Under Illinois law, the Department's decision to issue an NPL is deemed "prima facie correct" and "prima facie evidence of a penalty due under this Section." *Id.* Once the Department has issued an NPL to a corporate officer, the officer has the ultimate burden of proving that he is not liable for the penalty. *Branson v. Department of Revenue,* 168 Ill. 2d 247, 659 N.E.2d 961 (1995).

4. The Department of Revenue's Claim

Chandler filed no use tax return with the Department of Revenue and paid no use tax on its purchase of the aircraft. Chandler never filed tax returns of any kind

with the Department and was not registered with the Department in any capacity. The Department did not know about Chandler or the aircraft it purchased.

In early 1989, the Department was notified of Stoecker's bankruptcy. In accordance with its standard practice, the Department's bankruptcy unit researched Stoecker, uncovered several corporations associated with Stoecker that had tax liabilities, and filed claims in the bankruptcy against Stoecker as the responsible officer of the corporations. Because the Department's computer system displays only corporations that are registered taxpayers, the bankruptcy unit did not know about Chandler and did not link Chandler to Stoecker's bankruptcy.

In early 1990, a Department auditor in a different unit was reviewing F.A.A. title transfer documents for unreported aircraft purchases when he happened on Chandler's purchase of the aircraft. The Department began auditing the purchase. The auditor sent several letters to Chandler that went unanswered and also spoke to a salesman at JPA. Despite these efforts, the auditor never discovered Stoecker's connection to the corporation. In June 1990, the auditor sent a letter to Chandler proposing an audit liability for unpaid use tax. That letter, too, went unanswered. In late July 1990, the auditor obtained documents suggesting that Stoecker was an officer of Chandler, but, unaware of the bankruptcy, the auditor merely noted this in his records.

In September 1990, the Department formally issued an NTL to Chandler for the unpaid use tax on the aircraft. Chandler filed no protest, and the assessment became final by operation of law. There is no evidence that

Chandler sought administrative review of the assessment in the Illinois courts.

After the NTL was issued, the Department's collections division tried to collect the tax from Chandler. The collector initially sought to contact Chandler but determined that Chandler was out of business. He then made repeated efforts to contact Stoecker and Pluhar both by mail and in person, including sending a notice of intent to issue an NPL. Neither Stoecker nor Pluhar responded.

In June 1991, the Department's NPL unit formally issued an NPL to Stoecker assessing a penalty equal to the unpaid use tax. The NPL was sent certified mail but was returned unclaimed. No protest was filed, and the penalty assessment became final by operation of law. There is no evidence that Stoecker sought administrative review of the penalty assessment in the Illinois courts.

In September 1991, the Department sent Stoecker a demand for the assessed penalty. In response, counsel for Stoecker called the NPL unit and questioned Chandler's underlying tax liability. He later sent the NPL unit several letters enclosing documents about the sale. Neither in his initial telephone call nor in the two subsequent letters did Stoecker's counsel disclose that Stoecker was in bankruptcy.

In January 1992, Stoecker's counsel telephoned the Department's NPL unit again, asking what the Department intended to do. During this call, he revealed for the first time that Stoecker was in bankruptcy. The NPL unit immediately notified the bankruptcy unit, and on January 21, 1992, the Department filed a proof of claim in Stoecker's bankruptcy later amended to $911,769:

$868,351 in unpaid use tax and $43,418 in pre-petition interest.

5. Proceedings Below

As the court of appeals aptly observed, this case has "a complicated procedural history." (Pet. App. A-1). Most of that history is irrelevant to the question presented, as are the portions of the opinions addressing questions the Trustee has not raised.

In 1996, the bankruptcy court disallowed the Department's claim. In that court's view, the evidence did not prove Stoecker liable as a responsible officer who willfully failed to pay the tax. (Pet. App. C-45-74). The court acknowledged that the NPL was *prima facie* evidence of liability. (*Id.* at C-46, C-73). Nevertheless, the court said, once the Trustee presented evidence to rebut the presumption the NPL raised, the burden of proof shifted back to the Department, which had the "ultimate burden of proof." (*Id.* at C-73). The court appeared to rely on Bankruptcy Rule 3001(f) for this burden-shifting scheme. (*See id.* at C-5, C-73).

The district court affirmed the disallowance of the claim. Like the bankruptcy court, the district court relied on Bankruptcy Rule 3001(f) to place the ultimate burden of proof on the Department. (Pet. App. B-7). On this point, the court chose to follow *In re MacFarlane,* 83 F.3d 1041 (9th Cir. 1996), *cert. denied sub nom. California Franchise Tax Bd. v. MacFarlane,* 520 U.S. 1115 (1997), holding that the Department should not be able to benefit from a burden of proof that "arises outside of bankruptcy law." (*Id.* at B-9). The court agreed with the bankruptcy court that the burden had shifted back to the

Department and that the Department, relying primarily on the NPL, had not met its burden. (*Id.* at B-9-12).

The court of appeals reversed. In an opinion written by Chief Judge Posner, the court rejected the notion—advanced in *MacFarlane* and adopted by the district court—that bankruptcy is a kind of "equity free-for-all," one in which judges can curtail or expand entitlements based on "their personal notions of fairness." (Pet. App. A-9-10). Instead, the court said, bankruptcy courts have no authority to "cut down the entitlements that creditors seek to enforce in bankruptcy except as provided by the Bankruptcy Code itself." (*Id.* at A-9) (citation omitted). Burdens of proof are themselves entitlements (in part because they are "substantive" for purposes of the *Erie* doctrine), and the court found no indication in the Code "that [Congress] meant to shift the burden of proof from taxpayer to tax collector." (*Id.* at A-10-11). The Trustee's position, the court added, "would create a new incentive to declare bankruptcy. We have enough bankruptcies." (*Id.* at A-11).

The court accordingly found that the Trustee, not the Department, had the burden of proof, and that the Trustee had failed to meet it. The Trustee produced no evidence about Chandler's operations or Stoecker's role in filing tax returns or paying taxes that might have shown Stoecker was not a responsible officer. (*Id.* at A-7). And while Chandler had a copy of an opinion letter stating that no tax was due, there was no evidence that Stoecker himself ever saw the letter and no evidence that his failure to pay the use tax was not willful. (*Id.* at A-8). The court therefore concluded that the Department had a valid claim. (*Id.* at A-12).

REASONS FOR DENYING THE PETITION

The Trustee's petition should be denied for three reasons. First, the conflict in the circuits does not merit this Court's attention. The conflict is neither as widespread nor as serious as the Trustee makes out. Only four circuits have squarely confronted the question raised, and of those only two have addressed the question carefully and methodically. The two that have done so—the Fourth Circuit in *In re Landbank Equity Corp.*, 973 F.2d 265 (4th Cir. 1992), and the Seventh Circuit here—reached the same result for the same reasons. The decisions of the other two circuits are perfunctory and inconsistently reasoned. Without a clear rationale on the other side of the question presented, it is simply too soon for this Court to consider it.

Second, the question is not as significant as the Trustee and *amici* states would have it appear. The practical effect on federal and state tax collection is minimal. Where the ultimate burden of proof rests makes a difference primarily in audit cases like this one where the taxing body has almost no evidence available to it. Those cases are rare. The effect on federal tax collection, moreover, became even less significant after the Internal Revenue Service Restructuring and Reform Act of 1998. With certain exceptions, that Act shifted the burden of proof in "any court proceeding" to the I.R.S. 26 U.S.C. § 7491(a). The question presented does not deserve review.

Third, as the *amici* states argue, the court of appeals correctly decided the question. Nothing in the Bankruptcy Code or Rules alters the burden of proof that applies to tax claims under substantive tax law. The Trustee points to nothing, relying on "federal interests"

he says support a uniform burden of proof. (Pet. at 9). The only "interest" the Trustee identifies, however, is a policy of "equal treatment of creditors." (Pet. at 10). Assuming there is such an interest, in the allowance of claims all creditors are indeed treated equally: except where Congress has said otherwise, they retain the same substantive rights they held outside of bankruptcy. The Trustee is seeking better treatment for non-tax creditors, not equal treatment, and in doing so he is asking this Court to alter the rights of taxing bodies and change taxing schemes that Congress meant to leave unchanged.

The petition in this case raises a question that this Court declined to address only two years ago. *See In re MacFarlane*, 83 F.3d 1041 (9th Cir. 1996), *cert. denied sub nom. California Franchise Tax Bd. v. MacFarlane*, 520 U.S. 1115 (1997). The reasons to address it are even less "compelling" now than they were then. Sup. Ct. R. 10. The petition should be denied.[4]

I.

THE CONFLICT IN THE CIRCUITS DOES NOT WARRANT THIS COURT'S REVIEW.

Although the circuits are split on the burden of proof question, that split does not require attention now. The Trustee asserts that no less than eight circuits have

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[4] It is true, as the *amici* states observe, that the Solicitor General filed an *amicus* brief in *MacFarlane* stating that the Ninth Circuit lacked jurisdiction, and that "[p]erhaps" in denying certiorari this Court agreed. (St. Br. at 4-5). On the other hand, the denial may well have reflected this Court's views on the importance of the question, especially when only three circuits had considered it.

decided the question. (Pet. at 6). Five of the circuits, he says, have placed the burden in the bankruptcy court on taxing authorities, while a minority of three have done the opposite. The Trustee claims that this circuit conflict makes the question one of "widespread importance." (*Id.* 6). The *amici* states appear to agree. (St. Br. at 3, 7, 12).

The conflict is not nearly what the Trustee and *amici* states claim. In fact, only four circuits, including the Seventh Circuit here, have ever confronted the question presented. *See In re MacFarlane,* 83 F.3d 801; *Landbank,* 973 F.2d 265; *In re Fidelity Holding Co.,* 837 F.2d 696 (5th Cir. 1988). Decisions from other circuits do not discuss or resolve the question but simply assume a particular burden of proof. *See, e.g., In re Brown,* 82 F.3d 801, 805 (8th Cir. 1996); *Bronson v. United States,* 46 F.3d 1573, 1581-82 (Fed. Cir. 1995); *In re Fullmer,* 962 F.2d 1463, 1466 (10th Cir. 1992); *Resyn Corp. v. United States,* 851 F.2d 660, 663 (3rd Cir. 1988). The conflict that the other parties identify exists mostly in *dicta*.

The Seventh Circuit itself illustrates the odd tendency for *dicta* on this issue to be taken as something more. Like so many circuits, the Seventh Circuit decided an earlier case, *United States v. Charlton,* 2 F.3d 237 (7th Cir. 1993), in which the court simply assumed a certain burden of proof. Lower courts proceeded to cite *Charlton* as what the Seventh Circuit had "held." *See, e.g., Thinking Machines Corp. v. New Mexico Taxation & Revenue Dep't,* 211 B.R. 426, 429 (D. Mass. 1997). In *In re Carlson,* 126 F.3d 915, 921 (7th Cir. 1997), *cert. denied,* 523 U.S. 1060 (1998), however, the Seventh Circuit commented that it had not in fact resolved the question. The court did not resolve it until this case. Most of the decisions the Trustee cites no more represent what those

circuits "hold" than *Charlton* represented what the Seventh Circuit held. The circuit split is, to a large extent, more apparent than real.

As for the circuits that have actually decided the burden of proof question, they do not pose the kind of conflict that merits this Court's attention. The Seventh and Fourth Circuit decisions considered the question in detail and analyzed it carefully. Those decisions are in agreement. The Fifth and Ninth Circuit decisions, on the other hand, did neither and did not even agree with each other. It is not clear that the Fifth Circuit would reach the same result today.

In *Fidelity Holding Co.*, the first case to consider the question, the Fifth Circuit based its decision entirely on former Bankruptcy Rule 301(b). That rule, the court said, did not "differentiate between government and private claimants when proofs of claim are filed" and so created an "exception" to the general rule placing the burden of proof on the taxpayer. 837 F.2d at 698. The court not only misconstrued the rule (wrongly believing it concerned burdens of proof), the court cited nothing in the Code to support its conclusion and seemed to have the Rules and the Code confused. *Id.* Five years later, in *In re Placid Oil, Co.,* 988 F.2d 554, 557 (5th Cir. 1993), the Fifth Circuit reached the same result in a single paragraph, relying solely on *Fidelity*. This time, the court did not cite either the Code or the Rules, nor did it mention the Fourth Circuit's decision reaching the opposite result. *Id.*; *see also* 15 *Collier on Bankruptcy* ¶ TX5.04[6] at TX5-44 n.56 (Lawrence P. King, ed., rev. 15th ed. 1999) (criticizing *Placid Oil*).

In *MacFarlane*, the Ninth Circuit also cited and relied on *Fidelity*, finding its "logic . . . compelling." 83 F.3d at 1045. In the very next sentence, however, the court seemed to disagree with *Fidelity*'s "logic," conceding that in fact "[t]he bankruptcy code is silent on the allocation of the ultimate burden of proof in this case." *Id.* Unlike the Fifth Circuit, the court then "turn[ed] to policy considerations." *Id.* Balancing "the equities" between California and the other creditors, and noting that tax claims already receive priority in distribution, the court concluded that a taxing authority should not receive the "double benefit" of a burden of proof with "its origins outside of bankruptcy law." *Id.* (internal quotations omitted).

In contrast, the Fourth Circuit in *Landbank* and the Seventh Circuit in this case addressed the question of the appropriate burden of proof in detail, employing the same cogent analysis. *See Landbank,* 973 F.2d at 268-72; (Pet. App. A-8-11). Both courts agreed that the burden of proof under tax law generally falls on the taxpayer and that burdens of proof are substantive law. *Landbank,* 973 F.2d at 269-70; (Pet. App. A-10). Both agreed that although Congress can alter substantive rights in the Code, it has done nothing to alter the burden of proof for tax claimants. *Landbank,* 973 F.2d at 269-70; (Pet. App. A-11). And both agreed that equitable considerations alone do not permit bankruptcy courts to undo the substantive rights of taxing bodies in bankruptcy. *Landbank,* 973 F.2d at 271-72; (Pet. App. A-9-10).

Decisions of the courts of appeals aside, the Trustee claims that this case should be reviewed because of the "continuing conflicting decisions rendered by" district

courts and bankruptcy courts. (Pet. at 6). He mentions as well the "sharp clash of viewpoints" between the Seventh Circuit and the district and bankruptcy courts, something "likely to generate additional controversy." (Pet. at 6).[5]

Conflicting district court and bankruptcy court decisions are not a ground for granting certiorari and are relevant, if at all, only to the extent they show confusion over the issue. Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* § 4.8 at 179-180 (7th ed. 1993). There is no confusion here. The lower courts the Trustee mentions, for example, simply noted the dearth of authority from their courts of appeals and then followed other circuits or lower court decisions in their own circuits. *See Barrows v. I.R.S.,* 231 B.R. 446, 451 (D.N.H. 1998); *In re Forte,* 234 B.R. 607, 617-18 (Bankr. E.D.N.Y. 1999). Whatever confusion there is in the district and bankruptcy courts exists only over whether certain circuits have actually decided the burden of proof question. *See, e.g., Barrows,* 231 B.R. at 450 (erroneously citing *Charlton* and other decisions as having reached the question).

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[5] As another sign of the "controversy," the Trustee notes that the Tax Advisory Committee of the National Bankruptcy Review Commission endorsed proposals under which (1) the burden of proof from tax law would apply in the bankruptcy courts, but (2) the burden could be adjusted when the objector was not the debtor. (Pet. at 7 n.2). That was the Committee's view. The Commission, on the other hand, recommended only that Congress amend the Code "to clarify" that the tax law burden of proof be "equally applicable in bankruptcy court proceedings to determine tax liabilities under 11 U.S.C. §§ 502 and 505." *Final Report of the National Bankruptcy Review Commission* at § 3.2.5 (Oct. 20, 1997) (reprinted in vol. G *Collier on Bankruptcy* app. pt. 44 at 44-806 (rev. 15th ed. 1999)).

The "sharp clash of viewpoints" in the Seventh Circuit, meanwhile, is also irrelevant. This Court "will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or in another circuit." Robert L. Stern, et al., *supra,* § 4.8 at 178. Any confusion among lower courts in the Seventh Circuit was resolved when the court of appeals issued its decision in this case.

The split in the circuits, then, neither requires nor deserves this Court's review. Only four courts of appeals have decided the question here. Of those, the Seventh and Fourth Circuits employed the same thorough analysis to reach the same result. The Fifth and Ninth Circuits, by contrast, issued short, superficial, and inconsistently reasoned decisions. Although there is a split, the lines are not yet clearly drawn because the positions of the circuits on one side of the split are neither carefully thought out nor sharply defined. With time, the courts of appeals will likely resolve the question. It would be premature for the Court to consider it now.

II.

THE QUESTION PRESENTED IS NOT IMPORTANT ENOUGH FOR THIS COURT TO ADDRESS.

Just as there is a conflict in the circuits too insignificant to be worth resolving now, the question presented is not important enough to warrant this Court's attention. The Trustee asserts without any basis that the question "arises in every case" where an objection is filed to a tax claim. (Pet. at 7). Because "the overwhelming majority" of bankruptcy cases involve tax claims, he says, the question is vitally important to bankruptcy administration. (*Id.*).

The Trustee greatly overstates matters. First, not every bankruptcy case involves a claim for unpaid taxes. Many debtors owe no taxes. Even where taxes are owed, many bankruptcies are "no asset" cases in which the filing of claims is actively discouraged and so few claims are filed. Illinois itself files claims only in a fraction of bankruptcies. In the twelve months ending September 30, 1998, there were 65,337 bankruptcy cases commenced in Illinois bankruptcy courts. *See* Administrative Office of U.S. Courts, *Judicial Business of the United States Courts: 1998 Report of the Director* at 278 (Table F) (1998). During the same period, the Department filed 2,721 bankruptcy claims (a figure, incidentally, that includes claims in all bankruptcy courts, not just those in Illinois). In other words, the Department filed claims in fewer than 4% of Illinois bankruptcies. Those claims totaled only $12,428,371, or an average of $4,567.57. The "overwhelming majority" of bankruptcies (Pet. at 7) do not involve tax claims.[6]

Second, not every tax claim in bankruptcy hinges on which party bears the burden of proof. In some cases, as the Trustee seems to concede, no objections to tax claims are filed. When they are, in most cases liability is admit-

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[6] The *amici* states, more experienced tax collectors than the Trustee, do not assert that the question presented affects the "overwhelming majority" of bankruptcies. They note only that burden of proof problems arise in audit cases where there is little or no evidence. (St. Br. at 14). True enough. As the Department points out below, however, those cases are unusual.

ted; the sole question is whether the taxing body's proof of claim accurately reflects the amount of the liability and any penalties or interest. Tax claims in bankruptcy will turn on who bears the burden of proof primarily (1) in audit cases, i.e., cases where liability is not admitted, (2) where an objection is filed, and (3) where there is little or no evidence available to the taxing authority making the claim. Those cases are rare. In the Department's experience, fewer than 5% of the cases in which claims are filed (itself a small percentage of total bankruptcies) fit this description. The burden of proof question does not prove critical in "every case" (Pet. at 7) where a tax claim prompts an objection.

This case is one of the rare ones. Not only is it a bankruptcy involving a tax claim, but it is an audit case where the tax claim drew an objection asserting no liability, where there was virtually no evidence on the liability question, and where there was a lot of money at stake. Moreover, the debtor was a criminal defendant who invoked his Fifth Amendment privilege at his deposition and refused to cooperate with anyone. Except in cases like this, the question of who bears the burden of proof—the taxing authority or the taxpayer—has no serious effect on federal and state tax collection.

It is also worth noting that this question has even fewer consequences for federal tax collection now than it used to. In the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, Congress amended the Internal Revenue Code, changing substantive federal tax law to place the burden of proof on the I.R.S. *See* 26 U.S.C. § 7491(a). The amendment applies in "any court proceeding," *id.*, and so applies to federal tax

claims in the bankruptcy courts, 15 *Collier on Bankruptcy*, *supra*, ¶ TX5.03[5] at TX5-26-27. Although section 7491 contains specific prerequisites that must be met before the burden of proof will shift to the I.R.S., the enactment of section 7491 still diminishes the importance of the question in this case for the United States.

The question presented here is stimulating and is undeniably of some interest to taxing authorities.[7] However, this Court "does not sit to satisfy a scholarly interest," *Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 70, 74 (1955), even when "serious legal questions" may be involved, *English v. Cunningham*, 361 U.S. 905, 907 (1959) (Frankfurter, J.) (mem. on denial of cert.). The question here arises infrequently. The practical impact of its resolution on tax collection and on bankruptcy administration will not be what the Trustee and *amici* states suggest. The question does not deserve review.

III.

THE DECISION OF THE COURT OF APPEALS WAS CORRECT.

Finally, the petition should be denied because the court of appeals correctly decided the burden of proof question. Review of its decision is consequently unnecessary. The

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[7] But not as important to the states, apparently, as it once was. Twenty-four states submitted an *amicus* brief supporting the petition in *MacFarlane*. (St. Br. at 4). Nine have done so here. Of the nine, only four are from the Ninth Circuit and none are from the Fifth, although states from those circuits, at least, might have been expected to have some interest in the issue.

Department agrees with the *amici* states' argument on the merits (*see* St. Br. at 5-6, 7-14, 15-17) and incorporates that argument as its argument here. The Department adds only the following two points.

First, as the court of appeals held, the question of whether the burden of proof for tax claims changes in bankruptcy is a question of what the Bankruptcy Code provides. (*See* Pet. App. A-11). That is because Congress "has not hesitated to make [its] intentions clear" when it believed the bankruptcy system necessitated some alteration in the rights that parties hold under substantive law. *Landbank*, 973 F.2d at 270; *see also Butner v. United States*, 440 U.S. 48, 54 (1979). Even the Ninth Circuit in *MacFarlane* recognized what the court of appeals here correctly found (Pet. App. A-11): nothing in the Code or the Bankruptcy Rules purports to shift the burden of proof in tax cases away from taxpayers and onto the government. *MacFarlane*, 83 F.3d at 1045; *see also Landbank*, 973 F.2d at 270-71; 15 *Collier on Bankruptcy*, *supra*, ¶ TX5.03[5] at TX5-24.

The Trustee makes no effort in his petition to locate in either the Code or Rules some source for the burden of proof he would assign to taxing authorities. In fact, the Code barely rates a mention. Instead, the Trustee depends on what he calls "the federal interests supporting a uniform allocation of the burden of proof in bankruptcy cases." (Pet. at 8). Tax claims, he says, already receive favorable treatment, and taxing authorities therefore end up with a "decided advantage." (Pet. at 8).

Although the Trustee never actually uses the word "unfair," this is little different from the Ninth Circuit's

reasoning in *MacFarlane*. Unable to find anything in the Code supporting his position, the Trustee resorts to what the court of appeals here rightly called an "equity free-for-all." (Pet. App. A-10). Vague notions of fairness not grounded in the Code are no basis for disturbing the substantive rights of taxing authorities. *See United States v. Noland*, 517 U.S. 535, 540-41 (1996).

Second, the Trustee is mistaken even in claiming that policy, if not law, is on his side. He asserts that the rationale for placing the burden on the taxpayer makes no sense when trustees and creditors object to tax claims because, unlike the debtor, those parties are in no better position than the government: they have no more information about the debtor's affairs than the government does. (Pet. at 8).

The National Bankruptcy Review Commission, though, suggested otherwise. The Commission observed that the "government's position as a tax creditor in a claims contest is different from other creditors in a normal debtor-creditor relationship" because the government is *less* likely to have information about the debtor and his dealings than other creditors. *Final Report*, *supra*, at § 3.2.5 (reprinted in vol. G *Collier on Bankruptcy* app. pt. 44 at 44-811). And even assuming the Trustee is right, maintaining the same burden of proof in bankruptcy leaves other creditors no worse off than when the government brings its claim outside of bankruptcy, in state or federal court. The knowledge creditors have of a taxpayer's affairs does not magically disappear when the taxpayer files bankruptcy.

If anything, in fact, the trustee and other creditors are *better* off when the government makes tax claims in bankruptcy. A trustee in bankruptcy, after all, has the right to obtain relevant books and records from the debtor for the benefit of the remaining creditors. 15 *Collier on Bankruptcy*, *supra*, ¶ TX5.03[5] at TX5-25 n. 57 (noting that arguments of the kind the Trustee makes to justify shifting the burden of proof overlook this right). More important, creditors in bankruptcy are given written notice of tax claims and have standing to object to them. Creditors have no such rights when the government sues for taxes in state courts or other federal courts.

The Trustee's complaints about relative access to information mask what is really his larger policy argument: that placing the burden of proof on the party objecting to a tax claim defeats some federal interest in "the equal treatment of creditors." (Pet. at 10).

This argument goes nowhere. Where the allowance of claims is concerned, all creditors—private creditors and the government—*are* treated equally under the Code. As the court of appeals here correctly observed, except where Congress has expressly changed substantive rights all parties come into the bankruptcy court with the same rights and entitlements they had outside of bankruptcy. (Pet. App. A-9); *see also Butner*, 440 U.S. at 57 ("basic federal rule" in bankruptcy when state property rights are at issue "is that state law governs"). All creditors are treated identically because the position they held is neither improved nor worsened and the strength of their claim is neither increased nor decreased. In urging the

adoption of a different burden of proof for tax claims in bankruptcy, one less favorable to the government, the Trustee is not advocating "equal treatment" for non-tax creditors. He wants better treatment.

Where the distribution of claims is concerned, on the other hand, it is true that the government enjoys a favored status in bankruptcy. When it comes to parceling out the assets of the estate, tax claims have long been preferred under bankruptcy law, *see United States v. Reorganized CF & I Fabricators of Utah*, 518 U.S. 213, 330 & n.4 (1996), and with good reason. Unlike other creditors, a tax creditor is a nonconsensual creditor, and its losses are passed on to the public through higher taxes. *Thinking Machines*, 211 B.R. at 431 n.8. The "egalitarian appeal" of the Trustee's argument—one that assumes an overall policy under the Code of equal treatment of creditors—"overlooks the frequent disparate treatment of the government as tax-creditor found in the Bankruptcy Code regarding such matters as the priority and dischargeability of claims." 15 *Collier on Bankruptcy*, *supra*, ¶ TX5.03[5] at TX5-25. In the distribution of claims, some creditors are indeed more equal than others.

Tax claims are favored in distribution, though, not because of some unexpressed bankruptcy "policy," and not as the result of some court's conception of the "federal interests" underlying bankruptcy administration. They are favored because *Congress* decided to favor them in the Bankruptcy Code. Congress expressly made tax claims priority claims, 11 U.S.C. § 507(a)(8), and expressly rendered them non-dischargeable, 11 U.S.C. § 523(a)(1). (Pet. App. A-11).

Had it wanted it to, of course, Congress could have altered the substantive rights of taxing authorities in the allowance of claims as well as in their distribution. Congress could have eliminated the favorable burden of proof under tax law, replacing it with something else. But the question in this case is whether Congress chose to do so in the Code, not whether bankruptcy courts can do so as a matter of rough justice. *See Noland*, 517 U.S. at 540-41. The court of appeals here rightly found that the answer to that question is no. (Pet. App. A-11); *see also Landbank*, 973 F.2d at 270. And because "state law governs" property rights in bankruptcy unless Congress has seen fit to change those rights, *Butner*, 440 U.S. at 57, the burden of proof under substantive tax law continues to apply when tax claims are brought in the bankruptcy courts.[8]

The decision of the court of appeals on the question presented was correct, both as a matter of law and as a matter of policy. The Trustee's petition should therefore be denied.

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[8] To the extent there is any doubt about the intent of Congress, Congress may clear up the doubt even before the courts of appeals do. As the Department noted earlier, the National Bankruptcy Review Commission has recommended that Congress "clarify" that the burden of proof is unchanged and falls on the taxpayer when tax claims are brought in the bankruptcy court. *See Final Report*, *supra*, at § 3.2.5 (reprinted in vol. G *Collier on Bankruptcy* app. pt. 44 at 44-806).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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